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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CREDIT SUISSE FIRST BOSTON AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

Credit Suisse First Boston ("CSFB") is one of the world's leading investment banks and employs approximately 16,000 people around the globe. In 1997, after several months of study and consultation with leading academics and private practitio-

[1] Rule 37 statements: The counsel on the brief are its sole authors and no person or entity other than Credit Suisse First Boston made any monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

ners, CSFB adopted a comprehensive Employment Dispute Resolution (or "EDR") program for its 5,400 U.S. employees in order to ensure that they had a fair, efficient, cost-effective, and confidential means of seeking redress for any perceived infringements of their employment-related legal rights.[2]

The EDR program, which took effect on January 1, 1998, requires CSFB's U.S. employees to follow a three-step process to resolve any employment-related claim other than a claim for workers' compensation or unemployment benefits. The three steps, which follow each other in sequence, are internal grievance resolution; external mediation conducted by a neutral third party; and final, binding arbitration before an independent arbitrator.

Under the first step, internal grievance resolution, CSFB's employees bring any problem to the attention of their supervisor or Human Resources representative, who then attempts to resolve the problem confidentially and informally. If the employee is not satisfied with the result, and believes that that he has a legal claim, he may initiate external mediation.

Each mediation is conducted by an experienced mediator of employment disputes supplied by JAMS/Endispute, an independent provider of dispute resolution services. The mediator is selected by mutual agreement of the employee and CSFB, or, absent such agreement, by JAMS/Endispute. To commence mediation, an employee makes a written request and pays a filing fee of $150 to JAMS/Endispute. Employees who elect mediation have the right to retain and be represented by counsel.

If the mediator is unable to bring the parties together, either party may commence final and binding arbitration. Each arbitration is conducted by a single arbitrator supplied by one of three

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[2] The Appendix to this brief reprints CSFB's Statement of Policy, which explains its EDR program in detail. CSFB provided the Statement to all of its U.S. employees on adoption of the program in 1997 and gives it to all new U.S. employees.

independent administering bodies – JAMS/Endispute, the American Arbitration Association, or the Center for Public Resources Institute for Dispute Resolution. The party that requests arbitration selects the administering body.

To ensure that its employees not only have a fair process but also perceive the process to be fair, CSFB added numerous safeguards to the EDR program. Employees have the right to retain and be represented by counsel in mediations and arbitrations. They have input in selecting the mediator or arbitrator. They bear no more than a *de minimis* level of expenses. They enjoy the opportunity for discovery pursuant to the rules of the administering body. They are entitled to a written decision by the arbitrator that sets forth the nature of the dispute and explains the factual and legal bases for the decision. They have the same statutes of limitation as would apply if the dispute were the subject of a civil action in court. And they are eligible for the same potential remedies – including injunctive relief, comprehensive damages, and attorney's fees – that would be available to them in court. As an additional safeguard, the EDR program provides that no CSFB employee, and in particular no supervisor or manager, may take any retaliatory measures against any employee who invokes the EDR procedures.[3]

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[3] Although CSFB's EDR program is sufficiently attractive that rational parties should agree to its procedures even after a dispute has arisen, the strength of the employee's claim often inclines one party or the other to resist resolution out of court. On the one hand, if a claim is weak, the employer will be disinclined to arbitrate it. On the other hand, if a claim is serious or has other characteristics that might prove attractive to a jury, the employee's attorney will be disinclined to arbitrate it. By establishing a procedure to resolve claims before they arise, predispute arbitration agreements require the employer to open a forum to all claims and demand that the employee make a realistic claim without inflation for the contingency, however remote, of a runaway jury. Because parties generally will not agree to arbitration after a dispute has arisen, out-of-court resolution of employment disputes requires judicial recognition and specific performance of predispute arbitration agreements.

CSFB's experience with its EDR program to date shows that an accessible, inexpensive, and fair process resolves more disputes, and resolves such disputes more promptly and less expensively, than if either party were able to exercise his first angry instinct to take the other party to court. Since the inception of the program two-and-one-half years ago, every employment-related dispute brought under the EDR program but one has been resolved either through the informal grievance process or formal mediation conducted by a third party. On average, CSFB's EDR program resolves disputes in only one-fifth of the time and cost of litigation.[4] Based on CSFB's experience before

[4] According to CSFB's records, employment disputes have been resolved in an average of 4 months and at a cost of $12,700 under the EDR program (from January 1, 1998, when it took effect, to July 31, 2000), compared to an average of 22 months and $63,000 during a comparable two-and-a-half-year period before the program took effect. CSFB's experience is as follows:

Type of Employment Dispute Resolution	Number of U.S. Employees	Number of Employment Disputes Resolved	Average Resolution Time Per Employee (Months)	Average Transaction Costs Per Employee ($)
Litigation/Arbitration Before EDR	4,363 (at Dec. 31, 1997)	94	22.25	63,100
EDR: Grievance	5,399 (at July 31, 2000)	35	3.75	4,000
EDR: Mediation		12	6.0	27,500
EDR: Arbitration		1 pending	Not applicable	Not applicable
EDR: Total		47 (total)	4.0 (weighted average)	12,700 (weighted average)

Average transaction costs include the mediator's or arbitrator's fees, CSFB's legal fees, and disbursements, but do not include any amount paid to resolve the employee's claim.

the EDR program took effect, many disputes that were resolved to the satisfaction of both parties by mandatory (but non-binding) mediation would likely have ended up in lengthy and costly proceedings in court. Other disputes, primarily those resolved in the informal grievance process, would likely never have been brought at all and might have festered until they had developed into more serious problems.

Because CSFB is firmly committed to the prompt, fair, confidential, and non-acrimonious resolution of the disputes that unfortunately but inevitably arise out of the collaboration of highly motivated professional and administrative staff, it has a vital interest in this Court's determination of whether pre-dispute arbitration clauses are valid and may be specifically enforced under the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case – whether the Federal Arbitration Act (the "FAA") recognizes and enforces arbitration clauses in employment contracts – is posed by this Court's reconsideration of Congress's Commerce Clause power during the Great Depression. In 1925, when the FAA's predecessor, the United States Arbitration Act, was first enacted, federal law did not recognize and enforce arbitration clauses in employment contracts. The scope section of both Acts (9 U.S.C. § 2) covered only contracts "involving [interstate and foreign] commerce." In 1925, the only workers in interstate commerce were transportation workers. The exception section of both Acts (*id.* § 1), however, excluded employment contracts to which transportation workers were parties – *i.e.*, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Accordingly, the United States Arbitration Act did not recognize and enforce arbitration clauses in employment contracts in 1925.

Beginning in 1937, however, the Court's expansion of Congress's Commerce Clause power to activities "affecting" interstate and foreign commerce expanded the FAA's scope as well. As this Court concluded in *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995), "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full," *id.* at 277; *see id.* at 279 ("They [the Act's supporters] wanted to 'get a Federal law' that would 'cover' areas where the Constitution authorized Congress to legislate, namely, 'interstate and foreign commerce and admiralty.'" (citation omitted)). As a consequence, the United States Arbitration Act expanded to recognize and enforce arbitration clauses in employment contracts of the vast majority of workers in the national economy. The question posed by this case is whether the exception section (9 U.S.C. § 1) expanded in lockstep with the scope section (*id.* § 2). We submit that it did not, for two reasons.

First, unlike the text of the scope section, which is dynamic and "expand[s] along with the expansion of the Commerce Clause power itself," *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. at 275, the text of the exception section exempts only workers employed in interstate and foreign commerce and is thus limited to transportation workers. In 1925 and since, a worker is "engaged in foreign or interstate commerce" (9 U.S.C. § 1) only if he is "employed" or "occupied" in such commerce. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (1993) (definition of "engaged"); *see* WEBSTER'S NEW INTERNATIONAL DICTIONARY 725 (1928) (same definition). A worker is employed in interstate commerce, in turn, only if he moves or facilitates the movement of interstate commerce. Accordingly, the exception section excludes from the scope of the FAA only employment contracts of workers who are actually employed in interstate commerce – that is, transportation workers.

Second, Congress's reenactment of the United States Arbitration Act as the FAA in 1947 supports reading the FAA to reach

all contracts in interstate and foreign commerce – including employment contracts – and to except only those employment contracts to which transportation workers are parties. This Court customarily construes statutes on the assumption that Congress is aware of the Court's decisions and the legal effect of the language used in the legislation. That assumption is particularly well founded when the subject is this Court's Commerce Clause decisions rendered during and in the aftermath of the Great Depression. At that time, Congress was extraordinarily sensitive to the Court's decisions regarding the scope of its power under the Commerce Clause. What is more, this Court had held – only a few years before Congress enacted the FAA – that the phrase "engaged in" commerce signaled a narrower use of Congress's power under the Commerce Clause than the term "affecting" commerce and, in particular, reached only those "employees engaged in actual work on the transportation facilities." *McLeod v. Threlkeld*, 319 U.S. 491, 494 (1943). Against that unique background, Congress's enactment of the FAA – a codification of the United States Arbitration Act that in ordinary times would be of little moment – is significant and demonstrates that Congress must have understood § 1 of that FAA to except only those employment contracts to which transportation workers are parties.

ARGUMENT

I. The Static Text of the Exception Section to the Federal Arbitration Act Did Not Expand with Congress's Commerce Clause Power and Excludes Only Employment Contracts of Workers Employed in Interstate and Foreign Commerce – *i.e.*, Transportation Workers

This Court held in *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. at 275, that the FAA's scope section, which recognizes and enforces arbitration clauses in contracts "involving commerce" (9 U.S.C. § 2), "expand[s] along with the expansion of the Commerce Clause power itself." The question presented in

this case is whether the text of the exception section, which excepts only those "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. § 1), has the capacity to grow along with the expansion of Congress's Commerce Clause power.

Some commentators assume that the exception section expanded along with the scope section. *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 298 (1996) ("As the commerce power has been expanded by the United States Supreme Court, the exemption has expanded along with it . . . ."); *cf.* Richard A. Epstein, *Fidelity Without Translation*, 1 GREEN BAG 2D 21, 28 (1997) ("But once the FAA is (mistakenly) expanded, what fate befalls its exclusion? Perhaps it gets bigger as well . . . ."). Contrary to their assumption, however, the text of the exception section does not have the same capacity for growth, for two reasons.[5]

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[5] Before examining the text of the exception section, it is worth noting that Congress's exception of at least *some* employment contracts compels rejection of the suggestion by the court below that such contracts are entirely outside the FAA's scope. *See Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999); *see also Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1070 (9th Cir. 1999) (*per curiam*) (following *Craft*). If the court below were correct that employment contracts are outside the scope of the FAA (§ 2), then the exception section (in § 1) would be entirely superfluous. This Court has often warned that "Judges should hesitate so to treat [as surplusage] statutory terms in any setting," *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994) (footnote omitted); *see Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("cardinal principle of statutory construction" instructs that a court has a "duty to give effect, if possible, to every clause and word of a statute" (internal citations omitted)); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."); *Moskal v. United States*, 498 U.S. 103, 109-10 (1990) ("[A] court should 'give effect, if possible, to every clause and word of a statute.'"); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("[O]ur cases express a deep reluc-

First, the text of the exception section is fairly read to except only employment contracts to which transportation workers are parties. Section 1 excepts "contracts of employment of seamen, railroad employees, or any other class of workers *engaged in* foreign or interstate commerce" (emphasis added). The meaning of "engaged" (besides its meaning in contexts of marriage, the military, and machinery) is "occupied; employed." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (1993); *accord* WEBSTER'S NEW INTERNATIONAL DICTIONARY 725 (1928). Workers "engaged in" commerce are thus those who are "occupied" or "employed" *in* commerce – that is, workers in the transportation industry – not those whose labor "involves" or "affects" commerce.

Second, reading § 1 to except only employment contracts of transportation workers also makes sense of Congress's serial listing of "contracts of employment of seamen [and] railroad employees" and its limitation of the exception in the concluding phrase to "any *other* class of workers engaged in foreign or interstate commerce" (emphasis added). If Congress had intended to except all employment contracts from the FAA, it would have excepted "contracts of employment" or, at a minimum, "contracts of employment of workers engaged in industries involving commerce" (using the same terms as in the scope section), and perhaps adding, for the avoidance of doubt, "including those contracts to which seamen and railroad employees are parties." But Congress wrote neither exception. Instead, it listed two

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tance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). The narrow reading of the scope section offered by the court below is particularly suspect. If Congress had intended to exclude employment contracts from the FAA's scope in § 2, and had added a redundant exception in § 1 – for the sake of emphasis, let us say – then Congress would have excepted "contracts of employment" categorically and not gone on to enumerate the specific contracts outside the operation of that Act. The very existence of the exception section compels the conclusion that employment contracts are within the scope of the FAA.

classes of transportation workers whose employment contracts it excepted from the FAA and added a catchall phrase limited to "other" classes of workers similarly "engaged in" commerce. Congress's choice of language thus limits the exception clause to employment contracts to which transportation workers are parties.[6]

When this Court construed Congress's Commerce Clause power more broadly beginning in 1937, the scope of the FAA increased in lockstep. Because the text of the exception section did not have the same capacity for growth – being limited to employment contracts of workers "engaged in" commerce (9 U.S.C. § 1) – arbitration clauses in employment contracts (other than those to which transportation workers are parties) became

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[6] The conclusion that the catchall phrase should be limited to employment contracts involving workers similar to seamen and railroad employees also follows from application of the canon of *ejusdem generis*. That maxim of statutory construction provides that general words following specific words are to be construed to embrace objects similar in nature to those covered by the specific words. *See Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *see also Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84 (1990); *Hughey v. United States*, 495 U.S. 411, 419 (1990) ("In light of the principal of *ejusdem generis* – that a general statutory term should be understood in light of the specific terms that surround it – the catchall phrase should not be read to introduce into the restitution calculus losses that would expand a defendant's liability beyond the offense of conviction."); *Garcia v. United States*, 469 U.S. 70, 74-75 (1984); *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 176 (1946) ("Those words ["other uses"], however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes. . . . [A] proper construction of the act requires that the words 'other uses' shall be construed *ejusdem generis* with the words 'irrigation' and 'municipal.'" (internal quotation and citation omitted)); *cf. Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) (holding that "catchall provision" is "to be read as bringing within a statute categories similar in type to those specifically enumerated").

as valid and specifically enforceable as any other predispute arbitration agreement.

II. Congress's Reenactment of the Federal Arbitration Act in 1947 – After This Court Had Construed "Engaged in" to Include Employees who Work on Transportation Facilities – Supports Excepting Only Those Employment Contracts to which Transportation Workers Are Parties

Although Congress wrote the FAA's scope section in words that accommodated the subsequent expansion of its Commerce Clause power, and excepted employment contracts of transportation workers in language that did not, it may seem unfair to hold Congress to the legal effect of the words it chose when no Member could have anticipated the Great Depression, the New Deal, and the dramatic expansion of Congress's Commerce Clause power. As one Justice of this Court wrote in dissent in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting): "When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply . . . to the arbitration of disputes arising out of the employment relationship." As a consequence, the Ninth Circuit focused on the FAA's legal effect on employment contracts as it would have been understood by Congress in 1925: "[T]he FAA . . . was enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930s. Thus, to understand whether Congress intended for the FAA to apply to employment contracts, we need to understand Congress' commerce power in 1925." *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1086 (1999); *see Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1070 (9th Cir. 1999) (*per curiam*) (following *Craft*).

Contrary to the Ninth Circuit's reasoning, the FAA should be construed as Congress would have understood its text in 1947, *after* the expansion of Congress's Commerce Clause power.

Congress did enact the United States Arbitration Act in 1925. *See* Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886 (1925) (repealed). But Congress repealed that Act and reenacted its substance (without the old short title) as title 9 of the United States Code in 1947. *See* Act of July 30, 1947, ch. 392, § 2, 61 Stat. 669, 670-674 (codified as amended at 9 U.S.C. §§ 1-16); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 24 (Congress "reenacted and codified [the FAA] in 1947 as title 9 of the United States Code"). Thus, strictly speaking, the FAA was *not* "enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930s" (*Craft*, 177 F.3d at 186); instead, it was enacted in 1947, *after* that expansion had become manifest, and indeed five years after this Court decided *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942), which held that the Commerce Clause empowers Congress to regulate home-grown wheat.

Although it would ordinarily be inappropriate to read any significance into Congress's repeal and reenactment (to do so would constitute a "drag upon codification," HENRY H. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1403 (tent. ed. 1958)), and although it is true that Congress made no "material change" or "amendments" to the FAA's text in 1947 (H.R. REP. NO. 80-255, at 1 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515, 1515), the 22 years between the enactment of the United States Arbitration Act in 1925 and its reenactment as the FAA in 1947 witnessed the greatest economic catastrophe in the history of the Republic; constitutional disagreement between the Court and Congress over the scope of Congress's power to legislate against that catastrophe under the Commerce Clause; the Court's reconsideration and ultimate expansion of Congress's power; and Congress's careful exercise of that power using language calibrated to the activities it intended to reach. Against that background, it is reasonable to charge Congress with knowledge of the legal consequences of the terms with which it legislated.

Congress used the phrase "engaged in" commerce (or its cousin, "in" commerce) in the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. § 45, in addition to the United States Arbitration Act. In the early 1940s, shortly before Congress reenacted the FAA, this Court construed the critical phrase (or its cousin) in four principal cases. In each case, this Court reasoned that "engaging in" commerce (or "in" commerce) was not synonymous with "affecting" commerce; that Congress's use of the former, narrower phrase reflected its intention not to exercise its full power under the Commerce Clause; and that the Acts in question reached only transportation workers – specifically, employees maintaining and operating a toll road and drawbridge over a navigable waterway (*Overstreet v. North Shore Corp.*, 318 U.S. 125, 126, 128-32 (1943)) – and not workers operating and maintaining a building used to produce goods for interstate commerce (*Kirschbaum v. Walling*, 316 U.S. 517, 518, 522-23, 525-26 (1942)), a company selling candy (*Federal Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349, 349-52, 355 (1941)), or a cook providing meals to railroad maintenance employees (*McLeod v. Threlkeld*, 319 U.S. at 492-94).

In *Federal Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. at 349-52, 355, this Court held that a candy maker's intrastate sale of confections in certain allegedly deceptive packaging was not an "[u]nfair method of competition in commerce" within the meaning of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Court observed that the FTC "unsuccessful[ly] attempt[ed] in 1935 to secure from Congress an express grant of authority over transactions 'affecting' commerce in addition to its control of practices in commerce." 312 U.S. at 352. The Court "h[e]ld that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifesta-

tion of intention than Congress has furnished." *Id.* at 355 (second brackets in original).

In *Kirschbaum v. Walling*, 316 U.S. at 518, 522-23, 525-26, this Court did not hold that workers operating and maintaining a building used to produce goods for interstate commerce were "engaged in" commerce, and instead held that they were "engaged in the production of goods for commerce" within the meaning of §§ 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a), 207(a). The Court explained that "[s]ince the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce.'" *Id.* at 523. In answer to that question, the Court did not hold that the workers were "engaged in" commerce. Instead, it concluded that they were engaged in the production of goods for commerce: "In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" *Id.* at 525-26.

In *Overstreet v. North Shore Corp.*, 318 U.S. at 126, 128-32, this Court held that employees maintaining and operating a toll road and drawbridge over a navigable waterway were "engaged in" commerce within the meaning of §§ 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a) and 207(a). The Court declared that "it must be remembered that Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce." *Id.* at 128. The Court held that the employees were "employed or engaged 'in commerce,'" because they "are engaged in operating and maintaining [the corporation's] facilities so that there may be interstate passage of persons and goods over them" and are therefore "so closely related to that interstate movement as a practical

matter that we think they must be regarded, under the allegations of their complaint, as 'engaged in commerce' within the meaning of §§ 6 and 7 of the Act." *Id.* at 132.

In *McLeod v. Threlkeld*, 319 U.S. at 492-94, this Court held that a cook providing meals to railroad maintenance employees was not "engaged in" commerce within the meaning of §§ 6 and 7 of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a) and 207(a). Noting that "[t]he distinction in the coverage arising from this choice of language was well known to Congress" (319 U.S. at 493 n.2), the Court reasoned that by employing the phrase "engaged in commerce" Congress "did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority" (*id.* at 493). "The selection of the smaller group was deliberate and purposeful." *Id.* Summarizing the holdings of earlier cases, the Court concluded that the phrase "engaged in" commerce reached only those "*employees engaged in actual work upon the transportation facilities*" (*id.* at 494 (emphasis added)):

> [The cook] was not engaged in the production of goods for commerce. His duties as a cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause. Our question is whether he was "engaged in commerce." We have held that this clause covered every employee in the "channels of interstate commerce," *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not. Employees engaged in operating and maintaining privately owned toll roads and bridges over navigable waterways are "engaged in commerce." *Overstreet v. North Shore Corporation*, 318 U.S. 125. So are employees of contractors when the employees are engaged in repairing bridges of interstate railroads. *Pedersen v. J.R. Fitzgerald Construction Co.*, 318 U.S. 740, 742.

319 U.S. at 493-94 (footnotes omitted). "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." *Id.* at 497. The Court held that "[t]he furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves." *Id.*

This Court "presume[s] [Congress] to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (citing numerous cases and other authority).[7] It is a small step from that presumption to the conclusion that Congress was aware of this Court's construction of the phrase "engaged in" commerce (or "in" commerce) in the Fair Labor Standards Act and the Federal Trade Commission Act and adopted that interpretation when it reenacted the same phrase in § 1 of the FAA. Although Congress reenacted the FAA without materially changing the text of the United States Arbitration Act of 1925, this Court had in the meantime held that the operative language in § 1 of the proposed FAA reached only "employees engaged in actual work upon the transportation facilities." *McLeod v. Threlkeld*, 319

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[7] *Cf. Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) ("Since Keene has given us no reason to doubt that these cases represented settled law when Congress reenacted the 'claim for or in respect to which' language in 1948, see 62 Stat. 942, we apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them."); *Commissioner of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) ("The phrase . . . had acquired a settled judicial and administrative interpretation over the course of a half century before Congress enacted . . . the even broader statutory language . . . . Congress presumptively was aware . . . that the phrase . . . consistently had been construed to include the transfer of property in satisfaction of a monetary obligation. *See Albernaz v. United States*, 450 U.S. 333, 340-343 (1981).").

U.S. at 494. In light of this Court's holding, and Congress's awareness of this Court's Commerce Clause decisions (*see, e.g.*, 83 CONG. REC. 9166-73 (daily ed. July 14, 1938)), this Court should presume that the 80th Congress understood that the only employees "engaged in" commerce are transportation workers and therefore exempted the employment contracts only of transportation workers when it reenacted the FAA in 1947.

* * * * *

By enacting the FAA, Congress completed the legislation needed to enable private parties to resolve their disputes out of court. In 1872, Congress provided for the arbitration of employment disputes involving seamen. *See* Act of June 7, 1872, ch. 322, § 25, 17 Stat. 267 (codified as amended at 46 U.S.C. app. § 651) (repealed 1983). In 1920, Congress provided for the arbitration of employment disputes involving railroad employees. *See* Transportation Act, 1920, Pub. Law No. 66-152, tit. III, 41 Stat. 456, 469-474; *see also* Railway Labor Act § 7, 45 U.S.C. § 157 (*semble*). And in 1925 and 1947, Congress required courts to recognize and enforce agreements to arbitrate disputes in interstate and foreign commerce (9 U.S.C. § 2), excepting only "the two groups of transportation workers as to which special arbitration legislation already existed and . . . all other similar classes of workers" (*Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F. 2d 450, 452-53 (3d Cir. 1953) (construing 9 U.S.C. § 1).

CSFB's EDR program is entirely in keeping with the march of legislation in favor of consensual dispute resolution and demonstrates that judicial enforcement of employment-dispute-resolution programs is not just good law, but good policy. CSFB's carefully developed, even-handed program has reduced the time and cost needed to resolve disputes by 80 percent. To those tangible savings should be added the intangible benefits to the parties of resolving their disputes by mutual agreement and in confidence with the help of experienced and neutral third-party mediators.

To realize their potential, however, employment-dispute-resolution programs should meet minimum standards. They should communicate effectively the programs' terms to ensure agreement. They should build into the process an early-detection capability to discover, prevent, and quickly address offensive conduct (*e.g.*, by an internal grievance process). They should encourage amicable resolution of disputes and avoid the hostilities engendered by litigation (*e.g.*, by mandatory but non-binding mediation before an experienced neutral). And they should culminate in an adjudicative process, short of litigation, to provide finality to the procedure. CSFB's experience shows that such a program makes for a better place to work.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENT OF POLICY
CREDIT SUISSE FIRST BOSTON
EMPLOYMENT DISPUTE RESOLUTION PROGRAM

The Program

The Credit Suisse First Boston Employment Dispute Resolution Program (the "*Program*") is a three-step program of dispute resolution procedures. It is designed to provide employees located in the United States with an opportunity to resolve employment-related claims in a speedy, cost-effective, and confidential manner.

The three steps of the Program are an internal grievance procedure; mediation with a neutral third party; and final and binding arbitration before a neutral third party. Effective January 1, 1998, these procedures are the only means by which Credit Suisse First Boston employees located in the United States are able to seek resolution of employment-related claims of the type covered by the Program. They may not sue in court as to these claims.

The Types of Claims That Are Covered

All present and future claims against the Credit Suisse First Boston Business Unit (including each of its past, present, and future legal entities, and its and their past, present and future directors, officers, and employees, in both their personal and their institutional capacities) ("*Credit Suisse First Boston*") by an applicant for employment, an employee, or a former employee are covered by the Program if: (i) they relate to or arise from the applicant's, employee's, or former employee's application for employment, employment, or termination (including manner of termination) of employment, or from events occurring after termination but relating to one of the foregoing, and

(ii) they assert the violation or infringement of a legally protected right. The only types of employment-related claims that are *not* covered by the Program are claims for workers' compensation and claims for unemployment benefits. These will continue to be handled in accordance with applicable workers' compensation and unemployment laws.

Claims of the type covered by the Program, as described in the foregoing paragraph, are hereafter referred to as "*Employment-Related Claims*." Employment-Related Claims include, without limitation, all employment-related claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans with Disabilities Act, the Employee Retirement Income Security Act, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the Family and Medical Leave Act, or any other federal, state, or local statute, ordinance, regulation, or common law rule or decision regarding employment discrimination, civil rights, human rights, conditions of employment, or termination (including manner of termination) of employment, as the foregoing may from time to time be amended. State and local laws that are covered include, also without limitation, the laws of New York, California, Illinois, Texas, Florida, Georgia, Massachusetts, Pennsylvania, and any other state or any locality where Credit Suisse First Boston has, had, or may at any time have an office. Hereafter the term "*employee*" is used to refer to both former employees and current employees and to applicants for employment.

Other Important Information

- Credit Suisse First Boston personnel are specifically prohibited from taking any retaliatory action against an employee who has sought to use the Program. Violations of this rule will be treated with the utmost seriousness. Any employee who believes that he or she has been retaliated against for

using the Program should immediately notify the Human Resources Department or the Legal and Compliance Department.

- Adoption of the Program and an employee's use of the Program will not affect an employee's status as an at-will employee, and will not limit Credit Suisse First Boston's ability to take disciplinary or other personnel action against the employee. If an employee believes he or she has an Employment-Related Claim against Credit Suisse First Boston as a result of its taking any such action, the employee may institute proceedings under the Program, but may not sue in court.

- Credit Suisse First Boston reserves the right to amend or repeal the Program at any time, upon notice. No such amendment or repeal will affect the applicability of the Program to Employment-Related Claims that arose before the effective date of the amendment or repeal.

- Establishment of the Program does not affect an employee's right to pursue, in accordance with applicable law, any administrative agency process that may be available to the employee

- If a registered representative is subject to a legal requirement that he or she arbitrate Employment-Related Claims pursuant to particular rules or in a particular forum (for example, at or pursuant to the rules of a stock exchange), to the exclusion of other forums and rules, that requirement will prevail over the arbitration procedures described herein. Registered representatives will, however, in any event be subject to the Program requirements regarding the internal grievance procedure and mediation, including the requirement that they seek resolution of Employment-Related Claims pursuant to those procedures, in accordance with the Program, before proceeding to arbitration.

The Three Steps

Step One of the Program is the internal grievance procedure. Step Two is mediation before a neutral third party. Step Three is final and binding arbitration before a neutral third party. The three steps must be taken in sequence. The procedures an employee must follow to initiate each of the three steps and the manner in which proceedings pursuant to each step will be conducted are explained below.

Step One - Internal Grievance Procedure

If an employee believes he or she may have an Employment-Related Claim against Credit Suisse First Boston, the employee should first, and as promptly as possible, bring the problem to the attention of an appropriate person at Credit Suisse First Boston. Generally an employee's supervisor will be in the best position to understand and resolve a problem because he or she is most likely to be familiar with the employee's working situation and to know the other personnel in the employee's department. The first person an employee speaks to should therefore usually be his or her supervisor. If an employee does not feel comfortable speaking to his or her supervisor (because, for example, he or she believes the supervisor is part of the problem), he or she should take the issue to the supervisor's supervisor or to another appropriate person above the supervisor in the department's chain of command. Instead of directly approaching a supervisor, an employee may also, at any point in the process, contact his or her Human Resources representative to discuss the issue. Supervisors with whom issues are raised should contact their Human Resources representatives for assistance in resolving such issues.

As a matter of Credit Suisse First Boston policy, all employment-related issues that are raised in connection with the foregoing dispute resolution procedure are to be handled confidentially to the extent reasonably practicable under the circumstances. Often the matter can be dealt with by a supervisor without his or

her bringing anyone else (other than, in appropriate cases, a member of the Human Resources Department) into the discussions. At other times it may be necessary that another manager or other employees be consulted in order to resolve the matter. All supervisors, managers, and other employees are specifically prohibited from taking any retaliatory action against an employee who has raised an Employment-Related Claim and sought to utilize the foregoing procedure or any of the other dispute resolution procedures set out in the Program.

As explained below, Steps Two and Three of the Program may be used only in connection with Employment-Related Claims against Credit Suisse First Boston. Step One of the Program may, however, be used not only in connection with Employment-Related Claims but also in connection with any other employment-related grievances an employee may have.

Step Two - External Mediation

If an employee raised an Employment-Related Claim through the Step One internal grievance procedure and believes the dispute was not satisfactorily resolved through that procedure, he or she may elect to proceed to Step Two. Step Two consists of the mediation of an Employment-Related Claim by a neutral third party. To elect to proceed to mediation, an employee must make a request for mediation in the manner described below. Credit Suisse First Boston may also request mediation of an Employment-Related Claim asserted by an employee.

An employee may request mediation *only* in respect of an "Employment Related Claim," as that term is defined above. Within Credit Suisse First Boston, the Human Resources Department, in consultation with the Legal and Compliance Department, will be responsible for resolving questions about whether a particular claim meets the definition, including whether it involves the assertion of the violation or infringement of a legally protected right.

What Mediation Is

In mediation, the parties (and, if they so choose, their attorneys) meet in a confidential setting with a neutral third party, the mediator. The mediator encourages the parties to discuss their differences and assists them in developing a resolution that is satisfactory to each of them. If the parties are able to resolve their dispute through the mediation process, they typically set forth the terms of their agreement in a legally binding writing.

Mediation is widely considered a much more effective and appropriate means than litigation for resolving employment disputes. The proceedings are private, confidential, and flexible. If the dispute is resolved, the resolution is not one that was imposed on the parties but rather is one both parties played a part in designing and to which they both agreed. Often the parties are able to resume an amicable relationship after the resolution is achieved.

Conduct of Mediation

All mediations pursuant to the Program will be conducted by a single mediator supplied by JAMS/Endispute, an independent provider of dispute resolution services. The mediator will be experienced in resolving disputes involving employment issues.

Making a Request for Mediation

To make a request for mediation under the Program, an employee must submit a written request to his or her Human Resources representative and to JAMS/Endispute and pay a filing fee of $150 to JAMS/Endispute. A copy of the request form is available from the Human Resources Department.

Time Period for Making Request

A request for mediation under the Program must be filed within six months of the time that the complained of action or actions took place, or during such longer period as is allowed by

any applicable statute of limitations. If an employee does not file his or her request for mediation within the required period, he or she will forfeit any further right to make use of the Program and will be foreclosed from bringing an action in any court on the Employment-Related Claim. Employees with questions about the applicable statutes of limitations may contact their Human Resources representatives.

Step Three - Final, Binding Arbitration

It is Credit Suisse First Boston's expectation that most Employment-Related Claims will be resolved through Step One or Step Two. If, however, an employee has made an effort to resolve such a claim through mediation in accordance with Step Two but the mediation proceedings have not resulted in a resolution, the employee may proceed to Step Three, final and binding arbitration. To elect to proceed to arbitration, an employee must make a request for arbitration in the manner described below. Final, binding arbitration will be an employee's exclusive remedy for resolving an Employment-Related Claim that was mediated unsuccessfully.

Credit Suisse First Boston may also initiate an arbitration of an Employment-Related Claim asserted by an employee if mediation of the claim has not resulted in a resolution. Both the employee and Credit Suisse First Boston will be bound by any decision rendered by an arbitrator pursuant to Step Three, subject to the right to seek judicial review of the decision in accordance with applicable law.

What Final, Binding Arbitration Is

Final, binding arbitration is a process in which a dispute is presented to a neutral third party, the arbitrator, for a final and binding decision. The arbitrator renders a decision after listening to both parties present evidence and their arguments.

Arbitration is less formal than a court trial and generally is much quicker. It is, however, an orderly proceeding, governed by rules of procedure and legal standards of conduct. Each party has the right to at least a minimum amount of discovery, to present his or her proof, through testimony and documentary evidence, and to cross-examine the other party's witnesses. The arbitrator's decision is legally enforceable. In other words, the party to whom relief is granted may, if the other party does not comply with the terms of the award, sue in court to enforce the award.

Conduct of Arbitration

All arbitrations under the Program will be conducted by a single arbitrator supplied by JAMS/Endispute, the American Arbitration Association, or the Center for Public Resources (CPR) Institute for Dispute Resolution ("*Service Providers*"). The arbitrator will be selected, and the arbitration proceeding will be conducted, in accordance with the rules and procedures of such Service Provider applicable to the arbitration of employment disputes (the "*Employment Arbitration Rules*" of such entity), as such rules and procedures are then in effect. JAMS/Endispute, the American Arbitration Association, and CPR Institute for Dispute Resolution are all independent, experienced providers of arbitration services. The party that first requests an arbitration will choose which of the three Service Providers will be used for the proceeding. Copies of the three Service Providers' current Employment Arbitration Rules are available from the Human Resources Department.

Making a Request for Arbitration

To make a request for arbitration under the Program, an employee must submit a written request to his or her Human Resources representative and to the Service Provider he or she has selected and pay the Service Provider a filing fee of $150. A

copy of the request form is available from the Human Resources Department.

Time Period for Making Request

A request for arbitration under the Program must be filed within six months of the time that the complained of action or actions took place, or during such longer period as is allowed by any applicable statute of limitations. The time that elapses from when a request for mediation is filed pursuant to Step Two of the Program until five days after the employee gives Credit Suisse First Boston written notice, or Credit Suisse First Boston gives the employee written notice, that, in such party's view, the mediation proceedings are not likely to result in a resolution, will not be counted in calculating the time remaining in the applicable period. If an employee does not file his or her request for arbitration within the required period, he or she will forfeit any further right to make use of the Program and will be foreclosed from bringing an action in any court with respect to the Employment-Related Claim. Employees with questions about the applicable statutes of limitations may contact their Human Resources representatives.

Additional Mediation and Arbitration Rules and Procedures

The following additional rules and procedures will apply to any mediation or arbitration under the Program:

1. *Representation by Counsel.* An employee will have the right to be represented by counsel. An employee who chooses to be represented by counsel will be responsible for paying the fees and disbursements of such counsel.

2. *The Mediator or Arbitrator.* The mediator or arbitrator will be experienced in employment law and will be neutral and impartial. Any mediator will be selected by agreement of the employee and Credit Suisse First Boston from a panel provided by the Service Provider. If the employee and Credit Suisse First Boston cannot agree

on a mediator, the Service Provider will make the selection in accordance with its procedures as then in effect.

3. *Expenses.* There will be various expenses associated with a mediation or arbitration, such as the mediator's or arbitrator's daily fees and travel expenses. In the case of a mediation or arbitration proceeding initiated by an employee whose gross compensation (including bonus) for the calendar year preceding the year in which the proceeding was initiated was less than $150,000, Credit Suisse First Boston will, in the case of each such proceeding and with the employee's request, bear all of such expenses that are in excess of the initial filing fee for the proceeding. In the case of a mediation or arbitration proceeding initiated by an employee whose gross compensation (including bonus) for the calendar year preceding the year in which the proceeding was initiated was $150,000 or more, Credit Suisse First Boston will, in the case of each such proceeding and with the employee's consent, bear all of such expenses that are in excess of the initial filing fee for the proceeding plus one day's of the employee's gross cash compensation (including bonus) for such preceding year (calculated by dividing the amount of such total gross cash compensation by 365/6).

   Each party will be responsible for the fees and disbursements of its own counsel and the expenses relating to the production of witnesses or other evidence by it.

4. *Location of a Mediation or Arbitration.* Any mediation or arbitration will be held in the New York City metropolitan area or, at the employee's request and with Credit Suisse First Boston's consent, in the location of the Credit Suisse First Boston office where the employee applied for a position or works or worked when the complained of action or actions took place. If the proceeding takes place other than in the location of the

office where the employee applied for a position or works or worked when the complained of action or actions took place, Credit Suisse First Boston will reimburse the expenses of the employee and any witnesses produced by him or her in an arbitration for their expenses incurred in connection with traveling to the site of the proceeding.

5. *Governing Law.* The law applied by a mediator or arbitrator will be the laws of the State of New York, without regard for the conflicts of laws principles thereof.

6. *Authority of Arbitrator.* In the case of an arbitration, the arbitrator's authority will be limited to the resolution of legal disputes between the employee and Credit Suisse First Boston. He or she will be bound by and will be required to apply all applicable law, including that relating to the allocation of the burden of proof and remedies for violations of such law, if any, as well as all points of substantive law. He or she will have no authority either to abridge or to enlarge substantive rights available under existing law.

7. *Arbitrator's Decision in Writing.* The arbitrator will be required to render a written award that identifies the parties, summarizes the issues in controversy, and sets forth the decision of the arbitrator and the factual and legal bases for the decision.